DUAL PRELIMINARITY IN COMPARATIVE LAW

Giuseppe Martinico[*]

Abstract

In this essay I shall analyse the question of dual preliminarity in five legal experiences: France, Austria, Belgium, Germany, and Spain. The priority granted to one of the two preliminary questions, as we shall see, can have different origins. In the French and Belgian cases, the priority criterion is established by the legislative formant (to be understood in a broad sense, as it can also refer to super-primary legislation), while in the Austrian, German and Spanish cases the formant to be considered is the judicial one. After clarifying what is meant by dual preliminarity and analysing the case studies I shall offer some brief final reflections on the trends offered by comparative law.

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1. Introduction and structure of the essay

National judges in Europe are called upon to be loyal to several legal systems[1] at the same time and the question of dual preliminarity has contributed to creating tensions between domestic and EU law. In the following essay I shall look at five legal systems that, like the Italian one, have experienced the phenomenon of dual preliminarity. However, before

[*] Full Professor of Comparative Public Law at the Scuola Sant'Anna Pisa, giuseppe.martinico@santannapisa.it. I would like to thank Pablo Cruz Mantilla de los Ríos, Marcus Klamert, Leonardo Pierdominici, Giorgio Repetto, Francesco Saitto, Franz Mayer, Paul Pustelnik and Mattias Wendel for their comments and help.

[1] G. Martinico, *Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order*, 3 International Journal of Constitutional Law 871 (2012).

justifying and illustrating the case studies analysed here, it is worth dwelling on the terminology used in this work.

The Italian Council of State recently defined the dual preliminarity as that situation "in which questions of constitutional legitimacy and conformity with Union law concerning the same domestic rules are raised simultaneously in the same proceedings"[2].

Dual preliminarity cases are thus characterised by a "cierta identidad material"[3] and, in the definition of the Council of State, also by a subjective identity, since the referring judge is the same; in this case one can speak of dual preliminarity in the narrow sense.

At the same time, however- think of the Berlusconi case[4]- the concept of dual preliminarity (in a broad sense) can be used to describe those cases where the referring judges were different. Indeed, dual preliminarity may be also triggered by two different referring judges. This was, for example, the situation at the origin of Order 165/2004 delivered by the Italian Constitutional Court.

In that case the Court of Milan and the Court of Appeal of Lecce had raised a preliminary question to the Court of Justice, while the Court of Palermo had raised a question of constitutionality to the Italian Constitutional Court. On that occasion, the Italian Constitutional Court decided to change its order of business "in view of the substantial coincidence between the question of constitutionality, relating to the alleged conflict between the contested provisions and Community law, and that which is the subject of the aforesaid cases"[5].

Dual preliminarity is a mechanism that can be used in different ways, for example, looking at the Italian case, it was employed as a technique of hidden dialogue (an alternative way of dialogue other than the official way represented by the preliminary ruling procedure)[6]. Indeed, dual preliminarity was once deployed by the Constitutional Court to take the Luxembourg Court out of the preliminary ruling procedure. Then the Italian

[2] Consiglio di Stato, sez. IV, 16 luglio 2021, n. 5361.

[3] P. Cruz Villalón, J. L. Requejo Pagés, *La relación entre la cuestión prejudicial y la cuestión de inconstitucionalidad*, 50 Revista de Derecho Comunitario Europeo, 173 (2015), 182.

[4] CJEU, C-387/02, Berlusconi e a., ERC., 2005 I-03565.

[5] Corte costituzionale, ordinanza 165/2004.

[6] F. Fontanelli, G. Martinico, *Alla ricerca della coerenza: le tecniche del "dialogo nascosto" fra i giudici nell'ordinamento costituzionale multi-livello*, 58 Rivista trimestrale di diritto pubblico 351 (2008). G. Martinico, *Judging in the multilevel legal order: exploring the techniques of 'hidden dialogue*, 21 King's Law Journal 257 (2010).

Constitutional Court accepted to consider itself a judge under Art. 267 TFEU[7] and since then dual preliminarity has performed other functions.

The definition of dual preliminarity that I referred to at the beginning has a descriptive value; that is, it says nothing about the precedence (or priority) to be given to one of the two preliminary questions.

Instead, in the case law we shall explore, reference is made to mechanisms aimed at granting the right to the first word to one of the two courts involved, acknowledging the priority of one question over the other. As the Italian case is widely known[8],in this contribution I shall look at five experiences: France, Austria, Belgium, Germany and Spain. Dual preliminarity can have different origins. In the French and Belgian cases, dual preliminarity has its matrix in the legislative formant[9] (to be understood in a broad sense, as it can also refer to super-primary legislation as we shall see), whereas in the Austrian, German and Spanish cases the formant is the judicial one.

A final premise is necessary before analysing the selected cases: research such as this must necessarily consider an apparently extra-legal factor, namely the interpretative competition that exists between courts. In a context in which different constitutional levels (or poles, according to other terminology) share "multi-sourced equivalent norms" [10], interpreters develop forms of competition, trying to impose their view so as to have the last word on the interpretation of certain shared normative materials. I shall return to this later in the essay.

The idea of competition ("inter-court competition") between judges is not new in European studies, having been used by Alter [11] who has shown that

[7] Starting with: Corte costituzionale, ordinanza 103/2008.

[8] I focused on this subject in: G. Martinico, *Conflitti interpretativi e concorrenza fra corti nel diritto costituzionale europeo*, 46 Diritto e società 691 (2019). For a complete and up-to-date view of the Italian picture see, for all: G. Repetto, *Concorso di questioni pregiudiziali (costituzionale e comunitaria), tutela dei diritti fondamentali e sindacato di costituzionalità*, 57 Giurisprudenza costituzionale 2955 (2017).; G. Repetto, *Sentenza 269 e doppia pregiudizialità nella giurisprudenza della Corte costituzionale* (2022) http://rivista.eurojus.it/?s=repetto

[9] On the concept of "formant" in comparative law see: R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 American Journal of Comparative Law 4 (1991).

[10] Y. Shany, T.Broude (eds.), *Multi-Sourced Equivalent Norms in International Law* (2011).

[11] K. Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in A. Slaughter, A. Stone Sweet, J.H.H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context* 227 (1998).

judges of the same court system often use EU law to induce judicial changes in the case law of supreme or constitutional courts.

2. Dual Preliminarity and legislative formant: France and Belgium

The Melki[12] case was prompted by a reform introduced in France by which the so-called priority question of constitutionality was introduced. By Organic Law No. 1523 of 10 December 2009 relating to the application of Art. 61-1 of the Constitution, a new Chapter II bis had been inserted in Title II of Ordonnance No. 1067 of 7 November 1958. The new chapter was entitled "The application for a priority preliminary ruling on the issue of constitutionality".

According to the model designed by the reform, a common judge who doubts the constitutionality of a national provision must submit the question to the *Cour de cassation* (if the referring judge is an ordinary court) or the *Conseil d'État* (if the referring court is an administrative judge), so that they may assess the need to submit the question to the *Conseil Constitutionnel*.

In any case, the disputed "point" of the reform concerns the so-called priority question of constitutionality, according to which "in any event, where pleas are made before the *Conseil d'État* or the *Cour de cassation* challenging whether a legislative provision is consistent, first, with the rights and freedoms guaranteed by the Constitution and, secondly, with France's international commitments, it must rule as a matter of priority on the referral of the question on constitutionality to the *Conseil constitutionnel*"[13].

[12]ECJ, C-188/10 and C-189/10, Melki.

[13] Articles 23-5: "A plea alleging that a legislative provision prejudices the rights and freedoms guaranteed by the Constitution may be raised, including for the first time on appeal on a point of law, in proceedings before the Conseil d'État or the Cour de cassation. The plea shall be submitted in a separate, reasoned document, failing which it shall be inadmissible. The court may not raise the issue of its own motion.
In any event, where pleas are made before the Conseil d'État or the Cour de cassation challenging whether a legislative provision is consistent, first, with the rights and freedoms guaranteed by the Constitution and, secondly, with France's international commitments, it must rule as a matter of priority on the referral of the question on constitutionality to the Conseil constitutionnel.
The Conseil d'État or the Cour de Cassation shall have a period of three months from the date on which the plea is submitted to deliver its decision. The priority question on constitutionality shall be referred to the Conseil constitutionnel where the conditions laid down in Articles 23-2(1) and (2) are met and the question is new or of substance.

This mechanism ended, according to the *Cour de cassation* – the referring judge in the Melki case – by threatening the European mandate of the national court and based on these considerations it raised the preliminary question to the Court of Justice:

"The Cour de Cassation infers from Articles 23-2 and 23-5 of Order No 58-1067, and from Article 62 of the Constitution, that courts adjudicating on the substance, like itself, are denied, by the effect of Organic Law No 2009-1523 which introduced those articles into Order No 58-1067, the opportunity to refer a question to the ECJ for a preliminary ruling, where a priority question on constitutionality has been referred to the Conseil constitutionnel"[14].

As mentioned, to better frame the issue we must adopt the perspective of the interpretative competition existing between the two apex courts, the Court of Cassation and the Constitutional Council[15]. As a matter of fact, the reform had been the subject of two different interpretations by the rival courts. It is no coincidence that, shortly before the intervention of the Court of Justice, the French Constitutional Council intervened (using the procedure governed by Art. 61 of the Constitution) by providing a consistent interpretation of the domestic reform[16], making it compatible with EU law:

"Il (le juge) peut ainsi suspendre immédiatement tout éventuel effet de la loi incompatible avec le droit de l'Union, […] l'article 61-1 de la Constitution pas plus que les articles 23 1 et suivants de l'ordonnance du 7 novembre 1958 susvisée ne font obstacle à ce que le juge saisi d'un litige dans lequel est invoquée l'incompatibilité d'une loi avec le droit de l'Union européenne

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Where a reference has been made to the Conseil constitutionnel, the Conseil d'État or the Cour de Cassation shall stay proceedings until it has made its ruling. That shall not apply where the party concerned is deprived of his liberty by reason of the proceedings and legislation provides that the Cour de Cassation is to rule within a fixed period. If the Conseil d'État or the Cour de Cassation is required to rule as a matter of urgency, it is possible for the proceedings not to be stayed." Conseil constitutionnel", L.O.N. 2009-1523.

[14]ECJ, C-188/10 and C-189/10, Melki, par. 21.

[15] A. Dyevre, *The Melki Way: The Melki Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)* (2011) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1929807

[16] F. Fabbrini, *Sulla 'legittimità comunitaria' del nuovo modello di giustizia costituzionale francese: la pronuncia della Corte di giustizia nel caso Melki*, 4 Quaderni Costituzionali 840 (2010).

fasse, à tout moment, ce qui est nécessaire pour empêcher que des dispositions législatives qui feraient obstacle à la pleine efficacité des normes de l'Union soient appliquées dans ce litige"[17].

Taking note of this decision, the Court of Justice later reaffirmed the validity of Simmenthal[18], Rheinmühlen I[19]and Foto Frost[20] and concluded that the subsequent question of constitutionality (as interpreted by the Constitutional Council) was not necessarily incompatible with EU law[21].

It should be noted that the Belgian government[22]. intervened in support of the reasons presented by the French government and this is not a mere detail because Belgium also has its own history on dual preliminarity, as will be discussed.

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[17]*Conseil Constitutionnel*, decision n. 2010-605, 12 May 2010, www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis–1959/2010/2010–605-dc/decision-n–2010–605-dc-du–12-mai–2010.48186.html (par. 14). The French Conseil d'Etat would also intervened before the ruling of the Court of Justice.

[18] ECJ, 106/77, Simmenthal,

[19]**ECJ,166/73,** Rheinmühlen-Düsseldorf contro Einfuhr- und Vorratsstelle für Getreide und Futtermittel,**.**

[20]ECJ, 314/85, Foto Frost.

[21] "Accordingly, the reply to the first question referred is that Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. On the other hand, Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free:

–to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,

–to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and

–to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.

It is for the referring court to ascertain whether the national legislation at issue in the main proceedings can be interpreted in accordance with those requirements of EU law." ECJ, C-188/10 and C-189/10, Melki, par.57.

[22] ECJ, C-188/10 and C-189/10, Melki, par. 36.

Melki is a decision that has been much commented on, but not everyone has grasped, in my opinion, its true nature. It is, above all, a "guidance case", in the terminology of Tridimas[23], i.e., a case in which the Court of Justice, after having constructed a judicial test, delegated the solution of the same to the referring court:

"In that regard, it should be borne in mind that it is for the referring court to determine, in the cases before it, what the correct interpretation of national law is"[24].

The guidelines offered by the Court of Justice to the referring judge also say a lot about the nature of Simmenthal[25] and the fact that the latter is not only about disapplication, but above all about the immediacy of protection offered to the right stemming from EU law norms.

Accordingly, the ECJ replied by arguing that Art. 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free:

"– to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,
– to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and
– to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.
It is for the referring court to ascertain whether the national legislation at issue in the main proceedings can be interpreted in accordance with those requirements of EU law." [26].

It follows from this passage that the only way to allow immediate non-application before the end of the interlocutory proceedings is to guarantee the court the availability of a "any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order"[27].This is what the case law in France in the aftermath of

[23] T. Tridimas, *Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction*, 9 International Journal of Constitutional Law, 737 (2011).
[24] ECJ, C-188/10 e C-189/10, Melki, par. 49.
[25] ECJ, 106/77, Simmenthal.
[26] ECJ, C-188/10 e C-189/10, Melki, par. 57.
[27] ECJ, C-188/10 e C-189/10, Melki, par. 57.

Melki[28]. also seems to suggest. Only in this way the core of Simmenthal can be saved, since, as recalled, Simmenthal is not only about disapplication, but is above all about the national court's obligation to "give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means"[29].

We shall return to this when discussing the Austrian case.

The other case of constitutional priority that can be traced back to the legislative formant is Chartry[30], which concerned a preliminary question raised by the Tribunal de première instance of Liège. The question raised by the referring court concerned Art. 26 of the Special Law of 6 January 1989 about the Cour d'arbitrage[31]. In particular, the referring court asked the Court of Justice:

"Do Article 6 [EU] and Article 234 [EC] preclude national legislation, such as the Law of 12 July 2009 amending Article 26 of the Special Law of 6 January 1989 on the Cour d'arbitrage, from requiring the national court to make a reference to the Constitutional Court for a preliminary ruling, if it finds that a citizen taxpayer has been deprived of the effective judicial protection guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950; "the ECHR"], as incorporated into Community law, by another national law, namely: Article 49 of the Programme Law of 9 July 2004, without that national court's being able to ensure immediately the direct effect of Community law in the proceedings before it or to carry out a review of compatibility with the ECHR when the Constitutional Court has recognised

[28]M.Bossuyt, W. Verrijdt, *The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki Judgment*, 7 European Constitutional Law Review 355 (2011).

[29] ECJ, 106/77, Simmenthal.

[30] ECJ, C-457/09, Claude Chartry v Belgian State, in ECR. 2011 I-00819.

[31] Par. 4: "When it is alleged before a court of law that a statute, a decree or a rule referred to in Article 134 of the Constitution infringes a fundamental right guaranteed in a wholly or partly similar manner by a provision of Title II of the Constitution and by a provision of European or international law, that court of law shall first refer the question of compatibility with the provision of Title II of the Constitution to the Cour d'arbitrage for a preliminary ruling.
In derogation from paragraph 1, the obligation to refer a preliminary question to the Constitutional Court shall not apply:
1° in the cases referred to in paragraphs 2 and 3;".

the compatibility of the national legislation with the fundamental rights guaranteed by Title II of the Belgian Constitution?"[32].

As an illustration of the link between Melki and Chartry[33], one may recall that the former was also mentioned in the latter[34]. It should be made clear that Chartry referred to the pre-Lisbon scenario, in which, Art. 6 TEU did not yet provide for the accession (which, moreover, has not yet taken place) of the Union to the European Convention on Human Rights. With his request, however, the referring judge seemed to infer that the Convention could be part of the yardstick ("incorporated into Community law"[35]) on which the Court of Justice had to decide. The ECJ easily avoided the question, stating that "It follows that it has not been established that the Court has jurisdiction to answer this reference for a preliminary ruling"[36].

After the Chartry affair, there have been no other relevant questions, also because, now courts can either alternatively refer the question to the ECJ or the Constitutional Court or send the question to both at the same time[37].

3. Dual preliminarity and legal formants: Austria, Germany and Spain

The other three cases discussed in the article concern contexts in which the order of priority in favour of one of the questions for a preliminary ruling was established by the judicial formant. The first case to be analysed

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[32] ECJ, C-457/09, Claude Chartry v Belgian State, in ECR. 2011 I-00819, par. 15.
[33] ECJ, C-457/09, Claude Chartry v Belgian State, in ECR. 2011 I-00819.
[34] ECJ, C-188/10 and C-189/10, Melki,.par. 19-20: "According to the referring court, Mr Melki and Mr Abdeli claim that Article 78-2, fourth paragraph, of the Code of Criminal Procedure is contrary to the Constitution, given that the French Republic's commitments resulting from the Treaty of Lisbon have constitutional value in the light of Article 88-1 of the Constitution, and that that provision of the Code of Criminal Procedure, in so far as it authorises border controls at the borders with other Member States, is contrary to the principle of freedom of movement for persons set out in Article 67(2) TFEU, which provides that the European Union is to ensure the absence of internal border controls for persons.
The referring court considers, first, that the issue arises whether Article 78-2, fourth paragraph of the Code of Criminal Procedure is consistent both with European Union Law ('EU law') and with the Constitution.".
[35] ECJ, C-457/09, Claude Chartry v Belgian State, in ECR. 2011 I-00819, par. 15.
[36] ECJ, C-188/10 e C-189/10, Melki.
[37] Thanks to Patricia Popelier for this piece of information. For an updated overview: M. Bossuyt, W. Verrijdt, *The Full Effect cit*,

is the Austrian case. It is worth starting with the case A. v. B[38], which originated from a preliminary question by the Austrian Supreme Court, which had consulted with the Court of Justice to question the compatibility of a new judicial trend of the Austrian Constitutional Court. In a truly innovative ruling[39], the Austrian Constitutional Court had extended the special treatment accorded to the ECHR (regarded as a "shadow constitution"[40]) to the corresponding provisions contained in the EU Charter of Fundamental Rights. In this way it attempted to centralise the control of compatibility between domestic law and the Charter, creating another exception to the mechanism designed by Simmenthal[41]:

"In that context, the Oberster Gerichtshof states that an established line of authority required it, in recognition of the primacy of EU law, to refrain on a case-by-case basis from applying statutory provisions that were contrary to EU law. However, by judgment U 466/11 of 14 March 2012, the Verfassungsgerichtshof departed from that case law, ruling that its jurisdiction to review the constitutionality of national statutes, in proceedings under Paragraph 140 of the B-VG for the review, in general terms, of the legality of legislation (Verfahren der generellen Normenkontrolle), covers the provisions of the Charter. In the context of such proceedings, the rights guaranteed by the ECHR may be relied upon before the Verfassungsgerichtshof as constitutional rights. According to the Verfassungsgerichtshof, it follows that, by dint of the principle of equivalence, as established by the case law of the Court of Justice, the general

[38] ECJ, C-112/13, A c. B e altri.

[39] Austrian Constitutional Court, U 466/11-18; U 1836/11-13.

[40] P. Cede, *Report on Austria and Germany* in G. Martinico, O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* 55 (2010), 63.

[41] "The referring court is uncertain whether the principle of equivalence requires the remedy of an interlocutory procedure for the review of constitutionality also to be available in respect of rights guaranteed by the Charter, given that it would prolong the proceedings and increase costs. The objective of securing a general correction of the law through the striking down of a statute that is contrary to the Charter could also be achieved after the proceedings have come to a close. Furthermore, the fact that a right under the Austrian Constitution has the same scope as a right under the Charter does not trigger a waiver of the obligation to make a reference for a preliminary ruling. The possibility cannot be ruled out that the Verfassungsgerichtshof might construe that fundamental right differently from the Court and that, as a consequence, its decision might encroach on the obligations flowing from Regulation No 44/2001.", ECJ, C-112/13, A v. B, par. 26.

review of legislation must also cover the rights guaranteed by the Charter." [42].

Also in that decision, the *Verfassungsgerichtshof* (the Austrian Constitutional Court), after mentioning cases such as Cilfit, emphasised that:

"[I]t remains to be emphasized that there is no duty to bring a matter to the CJEU for a preliminary ruling if the issue is not relevant for the decision […] meaning that the answer, whatever it is, can have no impact on the decision of the case. Concerning the Charter of Fundamental Rights, this is the case if a constitutionally guaranteed right, especially a right of the ECHR, has the same scope of application as a right of the Charter of Fundamental Rights. In such a case, the Constitutional Court will base its decision on the Austrian Constitution without there being a need for reference for a preliminary ruling under the terms of Article 267 TFEU"[43].

On this basis, the Austrian Supreme Court asked the ECJ how to interpret Article 24 of Reg. 44/2001 and Article 267 TFEU. In particular, the referring court focused on the existing relationship between disapplication and the judicial review of legislation before the constitutional court, if the review of constitutionality also included the review of compatibility between national law and the Charter. According to the Austrian Constitutional Court this would also be desirable to avoid interpretative discrepancies, as well as on the basis of the argument of the *erga omnes* effect of decisions of unconstitutionality (already used by the Belgian and French governments in Melki)[44].

The ECJ referred to Melki, recalling the well-known guidelines already developed. This would also explain the decision to refer the matter not to the Grand Chamber, but only to the fifth Chamber. A v. B, therefore,

[42] ECJ, C-112/13, A v. B, par. 24.

[43] Austrian Constitutional Court, U 466/11-18; U 1836/11-13, par. 44.

[44] "In light of the fact that Article 47(2) CFR recognizes a fundamental right which is derived not only from the ECHR but also from constitutional traditions common to the Member States, it must be heeded also when interpreting the constitutionally guaranteed right to effective legal protection (as an emanation of the duty of interpreting national law in line with Union law and of avoiding situations that discriminate nationals). Conversely, the interpretation of Article 47(2) CFR must heed the constitutional traditions of the Member States and therefore the distinct characteristics of the rule of law in the Member States. This avoids discrepancies in the interpretation of constitutionally guaranteed rights and of the corresponding Charter rights". Austrian Constitutional Court, U 466/11-18, U 1836/11-13, par. 59.

also presented itself as a "guidance case", however, as scholars[45] have pointed out there are also differences between Melki and A. v. B. First, the Verfassungsgerichtshof, in the decision referred to by the Supreme Court, expressly quoted Melki, in order to demonstrate its adherence to the ECJ's solution. Second, the origin of the Austrian decision needs to be stressed. The case law of the Austrian constitutional court which was questioned in A. v. B. did not originate from a preliminary question of constitutionality, but from an individual constitutional complaint. There are thus differences between Melki and A. v B., which perhaps would have suggested a different composition of the Court of Justice for the resolution of the case. In the decision of the Austrian Constitutional Court, which was challenged by the Supreme Court, the *Verfassungsgerichtshof* had decided to centralise the resolution of the dispute, reminding the ECJ that "the interpretation of Article 47(2) CFR must heed the constitutional traditions of the Member States and therefore the distinct characteristics of the rule of law in the Member States. This avoids discrepancies in the interpretation of constitutionally guaranteed rights and of the corresponding Charter rights".[46]

The Austrian Constitutional Court probably intended to send a message to the ECJ, but then again, conflicts of interpretation have always been the driving force behind supranational integration. Unlike in the past, however, we are now faced with conflicts of convergence and not of divergence[47]. This is a paradoxical consequence of the constitutionalisation of EU law: whereas once upon a time conflicts were due to the absence of a supranational rule functional to the protection of a right[48], today conflicts arise from the attempt to get the interpretative monopoly of certain norms that are perceived as belonging to both levels.

The issue of the problematic implementation of the Charter is still debated in Austria. According to Klamert, "the primary law status of the Charter under EU law has created frictions in the established division of competences between the highest courts in Austria"[49]. More recently, the Austrian

[45] A. Guazzarotti, *Rinazionalizzare i diritti fondamentali? Spunti a partire da Corte di Giustizia UE, A c. B e altri, sent. 11 settembre 2014, C-112/13* (2014) https://www.dirittocomparati.it/rinazionalizzare-i-diritti-fondamentali-spunti-a-partire-da-corte-di-giustizia-ue-a-c-b-e-altri-sent/

[46] Austrian Constitutional Court, U 466/11-18; U 1836/11-13, par. 59.

[47] G. Martinico, *Lo spirito polemico del diritto europeo Studio sulle ambizioni costituzionali dell'Unione* (2011).

[48] See ECJ, 1/58, Stork.

[49] M. Klammert, *The implementation and application of the Charter of Fundamental Rights of the EU in Austria*, 4 Acta Universitatis Carolinae Iuridica 88 (2018).

Supreme Court again relied on the concept of equivalence of protection to ask some preliminary questions to the Court of Justice in Case 234/17, XC, YB and ZA[50]. That was a case concerning the possibility of extending to EU law what the legislator provided for the ECHR, i.e., the possibility of overriding a domestic judgment covered by *res iudicata*. The Court of Justice, caught in the middle of a true judicial civil war between the Austrian apex courts, concluded as follows:

After this case, the interpretative competition between the Supreme Court and the Constitutional Court subsided and there have been no further attempts to involve the Court of Justice in the internal battle between Austrian judges.

Unlike in other areas, the German case does not seem to be particularly interesting, although there is no lack of jurisprudential insights that could give rise to relevant developments in the future.

On the specific topic of dual preliminarity, according to the German Constitutional Court, the Basic Law does not impose a precise order in the case of dual preliminarity and therefore, in the case of uncertainty, national judges can choose between the two procedures at its own discretion: However, in 2011, the German Constitutional Court ruled that:

"The obligation incumbent on the ordinary courts prior to making a submission to the Federal Constitutional Court to clarify the content and binding nature of Union law, where appropriate by initiating preliminary ruling proceedings according to Article 267.1 TFEU, does not contradict the possibility of the ordinary courts, confirmed by the Federal Constitutional Court, to select between a review of statutes according to Article 100.1 sentence 1 of the Basic Law and submission to the ECJ, given that this relates to different case constellations. If there is a dispute as to whether a legal provision which is material to the decision in the original proceedings is compatible with Union law and constitutional law, there is – according to the case law of the Federal Constitutional Court from the point of view of German constitutional law – in principle no established sequence among any interim proceedings which might have to be initiated by the ordinary court according to Article 267.2 or 267.3 TFEU and submission according to Article 100.1 sentence 1 of the Basic Law. A court which has doubts under both Union and constitutional law may hence rule according to its own expediency considerations as to which set of interim proceedings it initially initiates (see BVerfGE 116, 202 <214>). In contradistinction to this, the binding of the national legislature by primary Union law which is at issue

[50] ECJ, C-234/17, XC and Others.

here is a matter of determining the power of the Federal Constitutional Court to review and is hence a preliminary question which imperatively must be clarified for the admissibility of a review of statutes"[51].

The German system itself, as is well known, has stubbornly pursued a strategy of distinction between systems[52], even if more recently, within the case law concerning individual constitutional complaints there have been interesting novelties. I refer, of course, to the cases on the so-called right to be forgotten[53], in which the *Bundesverfassungsgericht* established a new framework of "parallel applicability" of domestic and supranational rules on fundamental rights[54].

As this article is being finalised, the consequences of this development on the issue of double jeopardy have not yet been clarified by the German Constitutional Court.

The last case analysed is the Spanish case, for the framing of which some premises are necessary. In Spain, the *Tribunal Constitucional* has based state participation in the Union on Art. 93 of the Spanish Constitution[55], defined at first as a procedural precept and, only later, re-evaluated as a substantive norm[56]. The provision in question provides that an organic laws

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[51] 1 BvL 3/08, par. 55 e 56

[52] A. Di Martino, *Giurisdizione costituzionale e applicabilità della Carta dei diritti fondamentali dell'Unione europea: profili comparativi*, 3 Diritto pubblico comparato ed europeo 759 (2019), 768.

[53] 1 BvR 276/17 and 1 BvR 16/13.

[54] D. Burchardt, *Backlash against the CJEU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review*, S1 German Law Journal 1 (2020).

[55] Article 93, Spanish Constitution: "By means of an organic law, authorisation may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organisation or institution. It is incumbent on the Cortes Generales or the Government, as the case may be, to guarantee compliance with these treaties and with the resolutions emanating from the international and supranational organisations in which the powers have been vested."

[56] See Decision 28/1991 of the Spanish Constitutional Court, BOE No. 64, 15 March 1991. On Article 93 of the Spanish Constitution see A. López Castillo, *La Unión Europea «en constitución y la Constitución estatal en (espera de) reformas. A propósito de la DTC 1/2004 de 13 diciembre*, in A. Lopez Castillo-A. Saiz Arnaiz-V. Ferreres Comella, *Constitución española y constitución europea*, 13 (2004) 22; see also A. Saiz Arnaiz, *De primacía, supremacía y derechos fundamentales en la Europa integrada: la Declaración del Tribunal Constitucional de 13 diciembre de 2004 y el Tratado por el que establece una Constitución para Europa*, A. Lopez Castillo-A. Saiz Arnaiz-V. Ferreres Comella, *Constitución española y constitución europea*, 51 (2004).

must be passed by an absolute majority of Parliament to authorise the conclusion of treaties conferring on international organisations the exercise of competences provided for by the Constitution. This reading, in conjunction with the provisions of Art. 96.1 of the Spanish Constitution[57], has given Union law a super-primary value that Spanish scholars refer to as "infra-constitucional"[58].

This view does not entail, traditionally, the recognition of constitutional status to the rules of EU law. As a consequence, in Spain EU law does not enjoy constitutional status in the technical sense and, consequently, a case of conflict between national and EU law cannot be grounds for unconstitutionality for national legislation. The Spanish *Tribunal Constitucional*, in short, declares itself incompetent to resolve possible conflicts between domestic and EU rules that, in its reconstruction, give rise "only" to questions of legality and not, precisely, of constitutionality.

In Case 58/2004[59], the Spanish Constitutional Court, for the first time, admitted that a judge's refusal to refer a question to the Court of Justice for a preliminary ruling may ground an *amparo* claim (i.e., the individual constitutional complaint) if that refusal affects a fundamental right that can be protected by *amparo* itself. Moreover, the *Tribunal Constitucional* has made it clear that the mere refusal to make a reference for a preliminary ruling (in cases where there is an obligation for the judge to make a reference, according to the letter of the then 234 TEC – now 267 TFEU – and there are no previous rulings on identical or similar cases by the Court of Justice) is not sufficient. In this regard, EU law continued – and continues – to have no constitutional status. The possibility of sanctioning failure to make a reference for a preliminary ruling is also recognised in Austria (and Germany)[60], and this certainly makes Spain an interesting case for the purposes of the proposed comparative analysis. Specifically on the issue of dual preliminarity, the

[57]Article 96 Spanish Constitution: "1. Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order. Their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law. 2. The same procedure shall be used for denouncing international treaties and agreements as that, provided in Article 94, for entering into them".

[58]See, for instance, Judgment 64/1991 of the Spanish Constitutional Court, BOE n..98, 24 April 1991

[59]Spanish Constitutional Court, judgment n. 58/2004, www.tribunalconstitucional.es.

[60] For a comparative overview C. Lacchi, *Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the CJEU*, 16 German Law Journal 1663 (2015), 1671.

Tribunal Constitucional pronounced itself for the first time in Order No. 168/2016, in which it declared a question of constitutionality inadmissible, saying that if a common judge has both doubts of constitutionality and compatibility with EU law, it must give priority to the latter. The reason for this lies in the fact that any doubts about the compatibility of the norm with EU law make it inapplicable to the specific case and this removes one of the necessary requirements for raising the question of constitutionality.

The interesting question on which scholars have recently focused concerns the possibility of extending Article 10.2 of the Constitution to European Union law[61]. Article 10.2 of the Spanish Constitution embodies the constitutional openness of the Spanish system to the law of international human rights treaties:

"The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain"[62].

Given the economic matrix of EU law, Article 10.2 has not been called into question for supranational Treaties. However, EU law changed nature with Lisbon, given the binding nature of the Charter of Fundamental Rights, and today it is difficult to deny that "en realidad, al ámbito de los derechos fundamentales, es evidente que el pronunciamiento del Tribunal de Justicia es constitucionalmente relevante a los efectos del artículo 10.2 CE"[63]. On this matter, however, we must wait for judicial developments.

4. Conclusions

From this comparative analysis one might wonder whether the trend present in the case law of some Constitutional Courts might be a symptom of a worrying anti-Europeanism. I do not think this is the case. Constitutional Courts have inevitably sought to contain the risk of a spread of constitutional review disguised as a check on compatibility with supranational norms with regard tothe issue of fundamental rights. The Simmenthal doctrine, moreover, as we have seen, does not reduce itself to the question of disapplication, but requires the immediacy of the protection of rights derived

[61] P. Cruz Villalón, J. L. Requejo Pagés, *La relación cit.*,.191.
[62] Article 10.2 Spanish Constitution.
[63] P. Cruz Villalón, J. L. Requejo Pagés, *La relación cit.*,.191.

from EU law. In Melki[64], the ECJ gave important guidelines to balance this attempt to repatriate fundamental rights with that of guaranteeing the core of its doctrine[65].

In general, it would therefore be incongruous to describe this comparative trend as anti-European, because on closer inspection in the judgments commented on, the Constitutional Courts have never closed themselves off in interpretative solipsism. On the contrary, what has been described here seems to me to be tensions due to the pursuit of a strategy of progressive integration between EU law and national constitutional law, a strategy that is not taken for granted, as comparative law shows[66].

In particular, the Constitutional Courts of Austria and Belgium are among those most loyal to the Court of Luxembourg and, moreover, the *erga omnes* argument is not in itself negative provided that the guidelines established in Melki and A. v B. are applied. At the same time, the risk of instrumentalisation cannot be ruled out; it is not by chance that Melki has been invoked in some cases in Poland and Romania[67] by the referring judges to defend the authority of the common judges in problematic contexts where the Constitutional Courts have been captured or otherwise put under pressure by contingent majorities. In this, EU law is confirmed as a powerful antidote against the populist wave in some Member States.

[64] ECJ, C-188/10 e C-189/10, Melki.

[65] According to a different reading: "The Melki judgment does not downsize this full effect doctrine: it only states that one of its features, the immediacy rule, can be replaced by another feature, i.e., provisional measures, as long as the full effect of EU law remains guaranteed. This judgment has, moreover, granted the domestic judge a pretext to declare the QPC procedure contrary to EU law and to avoid mandatory constitutional review, and this pretext has indeed been used by the referring judge", M. Bossuyt, W. Verrijdt, *The Full Effect cit*, 385.

[66] A. Di Martino, *Giurisdizione costituzionale cit.*

[67] C-521/21, Rzecznik Praw Obywatelskich and C-357/19, Euro Box Promotion e a.